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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1929.

No. 336.

J. DU PRATT WHITE, FRANKLIN W. HOPKINS, EDWARD J. PARTRIDGE, GEORGE W. PERKINS, JR., FREDERICK C. SUTRO, GEORGE T. SMITH, WILLIAM CHILDS, W. AVERELL HARRIMAN, CHARLES W. BAKER and FREDERICK H. OSBORN, constituting the Board of Commissioners of the Palisades Interstate Park, HAMILTON WARD, as Attorney General of the State of New York, and ALEXANDER MACDONALD, as Commissioner of the Conservation Department of the State of New York,

Appellants,

against

SPARKILL REALTY CORPORATION and STANDARD TRAP ROCK CORPORATION,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES, FOR THE SOUTHERN DISTRICT OF NEW YORK.

MOTION TO ADVANCE.

Respectfully submitted,

WALTER H. POLLAK,
Counsel for Appellants.

GALLO & ACKERMAN, Inc., 142 Liberty Street, 'Phone—Rector 7257-8.

Supreme Court of the United States

OCTOBER TERM, 1929.

J. Du Pratt White, Franklin W. Hopkins, Edward J. Partridge, George W. Perkins, Jr., Frederick C. Sutro, George T. Smith, William Childs, W. Averell Harriman, Charles W. Baker and Frederick H. Osborn, constituting the Board of Commissioners of the Palisades Interstate Park, Hamilton Ward, as Attorney General of the State of New York, and Alexander Macdonald, as Commissioner of the Conservation Department of the State of New York,

Appellants,

against

Sparkill Realty Corporation and Standard Trap Rock Corporation,

Appellees.

Sirs:

PLEASE TAKE NOTICE that on the 7th day of October, 1929, or as soon thereafter as counsel can be heard, the within motion to advance will be submitted to the Supreme Court of the United States.

Dated, New York, September 20, 1929.

Yours, etc.,

WALTER H. POLLAK,
Counsel for Appellants.

To

Cullen & Dykman, Esqs.,
Counsel for Appellees,
177 Montague Street,
Brooklyn, N. Y.

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1929.

No. 336.

J. DU PRATT WHITE, FRANKLIN W. HOPKINS, EDWARD J. PARTRIDGE, GEORGE W. PERKINS, JR., FREDERICK C. SUTRO, GEORGE T. SMITH, WILLIAM CHILDS, W. AVERELL HARRIMAN, CHARLES W. BAKER and FREDERICK H. OSBORN, constituting the Board of Commissioners of the Palisades Interstate Park, HAMILTON WARD, as Attorney General of the State of New York, and ALEXANDER MACDONALD, as Commissioner of the Conservation Department of the State of New York,

Appellants,

against

SPARKILL REALTY CORPORATION and STANDARD TRAP ROCK CORPORATION,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK. (THREE JUDGES CONVENED PURSUANT TO SECTION 266 OF THE JUDICIAL CODE.)

MOTION TO ADVANCE.

Come now appellants, the Attorney General of the State of New York, the Commissioner of the Conserva-

tion Department of the State of New York, and the members of the Board of Commissioners of the Palisades Interstate Park, and move that this cause be advanced for early hearing.

This is an appeal from an interlocutory injunction issued by the District Court for the Southern District of New York (three judges sitting, pursuant to Section 266 of the Judicial Code).

The Board of Commissioners of the Palisades Interstate Park (whose members are jointly appointed by the governors of the states of New York and New Jersey) was created a body politic by Chapter 170 of the New York Laws of 1900 and empowered to select and take by eminent domain such lands along that part of the west bank of the Hudson River known as Palisades as "may in their opinion be proper and necessary to be preserved for the purpose of establishing a State Park and thereby preserving the scenic beauty of the Palisades" (Secs. 4, 5, Ch. 170, L. 1900). In 1928 by amendment of the New York Conservation Law (Ch. 242, L. 1928, in effect March 5, 1928) Chapter 170 of the Laws of 1900 was repealed and its provisions re-enacted with certain changes, as part of the Conservation Law. The original territorial limits of the Commissioners' power of eminent domain have been extended by amendment of the creating statute and also by the Conservation Law of 1928.

Since its inception, the Board of Commissioners has deemed that it was under a mandate to prevent, so far as lay within its power and jurisdiction, the slopes along the west bank of the Hudson River from being defaced by quarrying.

Under the original creating statute, and until its repeal and re-enactment in the Conservation Law of 1928, the Board was required to exercise its power of eminent domain by condemnation proceedings (Secs. 6-16 of Ch. 170, L. 1900) and could not acquire title to, or enter into

possession of, any property taken by it for park purposes until the value of the property as fixed by appraisal had been paid to the owner (Sec. 16 of Ch. 170, L. 1900).

Section 761 of the amended Conservation Law of 1928 gave to the Board of Commissioners of the Palisades Interstate Park "the power to acquire lands by entry and appropriation in the manner provided for in Section 59 of the Conservation Law." This section provides that the Conservation Department may, with the approval of the Governor, acquire lands for park purposes by filing in the office of the Secretary of State of New York a description of the property to be taken, with a notice endorsed thereon that the described property is appropriated by the People of the State of New York for park purposes, and serving upon the owner of the lands in question a duplicate of this description and notice. Upon such service the state immediately takes title to the property (L. 1928, Ch. 242, Sec. 59, Subd. 3) and in lieu thereof the owner acquires a right to sue for compensation in the New York Court of Claims and to have the amount of his judgment paid out of the State Treasury (L. 1928, Ch. 242, Sec. 59, Subd. 7).

Prior to October 11, 1928, appellee, Sparkill Realty Corporation, owned certain land within the region where the Commissioners of the Palisades Interstate Park were empowered to take land by eminent domain for park purposes. This property (which lies within the Southern District of New York) consists of Tallman Mountain, a conspicuous wooded hill on the west bank of the Hudson at the north end of the Palisades, together with adjacent meadow land between the hill and the river. Sparkill Realty Corporation had in 1927 leased this property to appellee Standard Trap Rock Corporation for twenty years, with a renewal privilege of twenty years, for quarrying purposes. The Standard Trap Rock Corpora-

tion had made extensive preparations for the commencement of its quarrying operations and in October, 1928, was about to begin excavation which would necessarily remove the trees, shubbery and surface soil and make permanent alteration in the appearance of the hill.

Accordingly, the Board of Commissioners of the Palisades Interstate Park on October 9, 1928, resolved to take this land by entry and appropriation in the manner provided by Section 59 of the New York Conservation Law (Record, tr. pp. 64-72, or. pp. 94-106); on the following day the approval of the Governor and the Conservation Commissioner was given (Record, tr. pp. 72, 73, or. pp. 106, 109). On October 11, 1928, the description of the property, endorsed with notice of appropriation, was filed in the office of the Secretary of State of New York and a duplicate copy thereof served upon the appellees (Record, tr. pp. 74-5, or. pp. 111-12). Thereupon, the Board of Commissioners of the Palisades Interstate Park entered upon the property and remained in possession until ousted by the interlocutory injunction appealed from.

On March 19, 1929, this suit was begun by the service of a bill of complaint and an order to show cause why an interlocutory injunction should not be granted (Record, tr. pp. 1-19, or. pp. 6-31). The Attorney General and Conservation Commissioner of New York were joined as defendants by virtue of Section 68 of the Executive Law and Section 9 of the Conservation Law. The bill of complaint attacked the validity of the appropriation of plaintiffs' property, alleging that Section 4 of Article VII of the New York Constitution "forbids the creation of State debts save to meet casual deficits or for State defense unless authorized by statute submitted and approved by the People at a general election and only in accordance with such statute so approved"; that Chapter 602 of the Laws of 1924 which provided for the issue of State bonds to the amount

of $15,000,000 for the development, improvement and extension of the State park system and was approved by the People at the general election held in November, 1924, allocated $3,500,000 for the Palisades Interstate Park, but that this referendum act provided that such moneys should be expended and lands acquired by the Commissioners of the Palisades Interstate Park under the "provisions of Chapter 170 of the Laws of 1900 as amended" (Record, tr. p. 7, or. p. 14); that Chapter 170 of the Laws of 1900 contained no provision for the acquisition of lands by entry and appropriation, and was wholly repealed by Chapter 242 of the Laws of 1928 which authorized the Commissioners of the Palisades Interstate Park to take land by entry and appropriation; that an allocation of the sum of $500,000 derived from the bond issue for the acquisition of plaintiffs' property, made on or about September 29, 1928, was therefore void and of no effect, and that "no sum whatever has been appropriated for the acquisition of plaintiffs' property by entry and appropriation" (Record, tr. p. 7, or. p. 14).

The complaint further alleges that the appropriation of $3,500,000 allocated to the Palisades Interstate Park by the Referendum Act, and approprriated for the Palisades Interstate Park in accordance therewith by Chapter 16 of the Laws of 1926, has lapsed for lack of a valid reappropriation, in that the law purporting to reappropriate said sum (Ch. 75, Part 5, L. 1928) fails to comply with the requirements of Section 21, Article III of the New York Constitution by failing to specify the object to which the sum appropriated is to be applied (Record, tr. p. 8, or. p. 15).

The bill of complaint prays that the description and notice relating to plaintiffs' property and the acts of the defendants thereunder be adjudged invalid as violative of Section 1, Article XIV of the Articles in addition to and amendment of the Constitution of the United States

of America and of Section 6 of Article I and Section 4 of Article VII of the Constitution of the State of New York; further, that it be adjudged that Chapter 75, Part 5, of the Laws of 1928, in so far as it relates to the "State Park system" and the reappropriation of $11,912,850.58, is invalid as violative of the provisions of Section 21, Article III, of the Constitution of the State of New York, and that the defendants be enjoined from enforcing the provisions of Chapter 242 of the Laws of 1928 with respect to plaintiffs' property and from continuing in possession thereof (Record, tr. pp. 9-10, or. pp. 16-17).

On June 7, 1929, the three judges of the District Court rendered an opinion sustaining these contentions (Record, tr. pp. 86-97, or. pp. 131-148), and on June 21, 1929, entered an order denying appellants' motions to dismiss (for lack of jurisdiction and failure to state a cause of action and lack of equity) and granting appellees' application for interlocutory injunction. The order recites (Record, tr. p. 82, or. pp. 125-6) that the Court is

> "of opinion that the provisions of chapter 242 of the laws of 1928 of the state of New York, if so construed as to vest in defendant, Board of Commissioners of the Palisades Interstate Park, power to acquire lands by entry and appropriation in the manner provided for in section fifty-nine of the conservation law of said state and all acts of defendants pursuant thereto, in the absence of funds separately appropriated by the legislature of said state in such an amount as to be reasonably certain to cover an award which may reasonably be made for said lands, are invalid as violative of the provisions of Section 1, Article XIV of the articles in addition to and amendment of the Constitution of the United States of America and of Section 6, Article I and Section 4, Article VII of the Constitution of the State of New

> York, and that no appropriation of funds has been made by the said legislature for said purpose",

and provides (Record, tr. pp. 82-3, or. p. 126) that

> "Pending final decree in this action and until the further order of this Court the defendants and each of them and each of their officers, agents, servants and employees, their successors in office and any and every person acting or purporting to act under or by virtue of Chapter 242 of the Laws of 1928 of the State of New York or a certain notice, description or certificate of defendants, Board of Commissioners of the Palisades Interstate Park, dated October 11, 1928, with reference to the property hereinafter described be and hereby are enjoined and restrained, jointly and severally, from in any way enforcing or attempting to enforce the provisions of said act, notice, description or certificate against plaintiffs by entry and appropriation as aforesaid or from instituting or prosecuting any action or proceeding at law or in equity by summons, writ, petition, bill or otherwise for the purpose of compelling compliance with or inflicting or recovering any penalty, forfeiture or damage for non-compliance by plaintiffs with said act, notice, description or certificate or from continuing in possession of plaintiffs' said property".

The interlocutory injunction has thus restored the possession of the premises to the appellees, and Standard Trap Rock Corporation since retaking possession has applied to the Department of War of the United States for permission to erect a dock and causeway one-half mile in length from the property in question into the Hudson River.

Appellants' petition for appeal was allowed by Hon. Martin T. Manton, Circuit Judge, on July 22, 1929; on the same day the bond on appeal was approved and filed and appellees' assignments of error were duly filed. The record in this court was filed and docketed on August 21, and has been printed. The jurisdictional statement required by Rule 12 was filed on September 19.

On appeal, appellants will, as appears by the statement of points filed in this court on August 21, urge that the District Court erred in the various particulars enumerated in appellants' assignments of error.

Advancement of this case is asked on the following grounds:

1. Substantial delay in the determination of this appeal will be almost as prejudicial to the interests of the People of the State of New York as a final decree in appellees' favor would be. Appellees, by the interlocutory injunction, have been given possession and secured the "free use and enjoyment" of the property. They are thus left free to adapt it to their commercial purposes, and in so doing to destroy the scenic beauty and historic condition of the region, the preservation of which is one of the primary objects of appellants' taking the land as a park. A speedy hearing and determination of the appeal is therefore essential for the preservation of this park for the people in the event that the interlocutory injunction is reversed.

2. Since the enactment of the Adirondacks Park Act in 1897, entry and appropriation has become the method employed by the Conservation Department of the State of New York (and its predecessors) for the acquisition of lands for park purposes, to the virtual exclusion of the alternate method of condemnation. The opinion of the District Court and its interlocutory injunction order declare that this method violates the constitutional re-

quirements of due process unless before the entry and appropriation, funds have been "*separately* appropriated by the legislature of said state in such an amount as to be reasonably certain to cover an award that may reasonably be made for such lands." No such stringent requirement exists in any of the New York statutes which provide for the use of this method of exercising the right of eminent domain for park purposes (see L. 1928, Ch. 242—Sec. 50, Subd. 2; Sec. 694; Sec. 717, Subds. 4 and 8; Sec. 727, Subd. 2; Sec. 737, Subd. 1; Sec. 777, Subds. 1, 6 and 8; Sec. 786).

The doubt thus cast by this decision upon the constitutional validity of this method as customarily exercised in New York must virtually suspend the use of this method by the Conservation Department and the various park commissions under it until this appeal is determined.

3. The opinion of the District Court and its decree declare the re-appropriation for the Palisades Interstate Park fund contained in Part 5 of Chapter 75 of the Laws of 1928 to be invalid under Section 21, Article III of the New York Constitution, because there is no statement in the re-appropriation act of the use to which the funds re-appropriated are to be applied. If this ruling be correct, the re-appropriation of $11,912,850.58 for the state park system fund is likewise invalid and other re-appropriations affecting other state funds—the World War Bonus Fund and the State Institutions Building Fund—are likewise invalid (see Laws 1928, p. 224). Uncertainty as to the legal availability of the re-appropriated funds thus embarrasses the State's whole program of park development and other State agencies as well, so long as this appeal is pending.

For all these reasons the public interest will be subserved by the advancement of this cause.

WHEREFORE, appellants pray that this case be advanced upon the calendar and assigned for hearing at an early date.

Dated, September 20, 1929.

Respectfully submitted,

WALTER H. POLLAK,
Counsel for Appellants.

ENGELHARD, POLLAK, PITCHER & STERN,
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Second Assistant Attorney General
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